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Chasing Constitutional Change: Tracing the Normalization of Illiberal Democracy

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Abstract

The normalization of illiberal democracy into an everyday experience is a profound and consequential constitutional change that accompanies democratic backsliding.

Long gone are the days when illiberal attacks on the founding values of the Union (among them the rule of law) by an illiberal member state were considered dramatic – and not sheer embarrassment. The normalization of the EU's rule of law crisis is not an isolated incident. It is a symptom of the normalization of illiberal constitutional and political practices around the world, witnessed in illiberal/hybrid regimes, but also in established democracies. The architects of contemporary illiberal democracies did not develop a grand constitutional design of their own, nor did they devise a new, distinctive approach to the rule of law. Instead, they tweak the institutional design of decently functioning constitutional democracy -

arrogating executive powers through compromising processes of political participation, constitutional accountability and individual liberties. Illiberal tweaks secure democratically elected actors' lasting hold on constitutional offices and assist their self-perpetuation through constitutional means even in the face of opposition or resistance (illiberal constitutional resilience). Due to their propensity to rule by cheating¹, the gap between the constitutional words and the realities² of illiberal democracies can be rather wide.

While the ideological coherence of illiberal constitutional democracies may be disputed in academic circles, their ability to learn and adapt for self-preservation is not disputed anymore. Their constitutional tweaks also adjust the realm of the politically possible. The January 6, 2021 attack on the Capitol that was inflamed by President Trump in the aftermath of his election defeat may not have normalized constitutional coups, yet, it certainly inspired illiberal political leaders. A few months later an open letter of influential political figures warned in an open letter that President Bolsonaro and his circle are preparing for a coup, a la January 6.³ Even those who find a coup unlikely admit that Bolsonaro's "continued sowing doubt over the election process and the integrity or usefulness of the supreme court, while picking another army general as his running mate [...] could—depending on the election results—could cause tension in parts of the electorate, including among officers tasked with public security."⁴

This paper explores patterns of constitutional change amidst the normalization of illiberal democracy. The normalization of illiberal constitutional practices is not a claim about the extent or intensity of democratic backsliding. Rather it speaks to a sea change in the realm of *constitutional imagination*: the ability of a constitution "to project an account of political existence in ways that shape - and reshape - political

¹ A Sajó, Ruling by Cheating (CUP 2021)

² S Voigt, Mind the gap: Analyzing the divergence between constitutional text and constitutional reality, ICON 19(5): 1778–1809 (2021)

³ <https://www.theguardian.com/world/2021/sep/06/brazil-warning-bolsonaro-may-be-planning-military-coup-amid-rallies>

⁴ Raul Jungmann: There will be not be a coup in Brazil, June 29, 2022, <https://www.americasquarterly.org/article/jungmann-there-will-not-be-a-coup-in-brazil> [Raul Jungmann was Brazil's defense and public security minister from 2016 to 2018.]

reality.⁵ Part I explores constitutional practices that assist the settlement of the abuse of powers and the lasting self-perpetuation of illiberal incumbents into an everyday political experience. Offering comparative insights, Part II focuses on how illiberal political actors manipulate constitutional continuity. Thereafter Part III explores how transnational alliances inspire the transformation of constitutional imagination and boost the resilience of illiberal/hybrid regimes.

The transformation of constitutional imagination due to illiberal normalization may well be the most consequential constitutional change of our times.

⁵ M Loughlin, *The Constitutional Imagination*, *Modern Law Review* 78(1): 1-25,3 (2015)